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April 5, 2004

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Ex Parte Filing – WC Docket No. 04-30

Dear Ms. Dortch:

Enclosed for filing in the referenced Docket as a written ex parte submission is the Memorandum of Decision in Southern New England Telephone Company v. Connecticut Department of Public Utility Control, et al., No. CV 04 0525443S of the Superior Court of Connecticut, Judicial District of New Britain, dated April 1, 2004.

If there are any questions on this matter, please contact the undersigned counsel.

Respectfully submitted,

Paul C. Besozzi
Counsel for Gemini
Networks CT, Inc.

PCB:tmc

Enclosure

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cc Russell Hanser (by electronic mail)

NO. CV 04 0525443S	:	SUPERIOR COURT
SOUTHERN NEW ENGLAND TELEPHONE COMPANY	:	JUDICIAL DISTRICT OF NEW BRITAIN
V.	:	
CONNECTICUT DEPARTMENT OF PUBLIC UTILITY CONTROL, ET AL.	:	APRIL 1, 2004

MEMORANDUM OF DECISION

This case is an administrative appeal by Southern New England Telephone Company (SNET) of a final decision of the Connecticut Department of Public Utility Control (DPUC). This administrative appeal is authorized pursuant to Connecticut General Statutes §§ 16-35, 4-183 (Uniform Administrative Procedures Act) and 51-197b.

The parties to this appeal are SNET, which is a Connecticut corporation that provides local telecommunication services throughout Connecticut. SNET, which formerly was a monopoly provider of telephone service in Connecticut, is known for purposes of federal and state telecommunications law as an incumbent local exchange carrier (ILEC).

The defendant DPUC is an agency of the state of Connecticut charged with the certification and supervision of telecommunications companies in the state of Connecticut pursuant to Connecticut General Statute § 16-1 et seq. and the federal 1996 Telecommunications Act, 47 U.S.C. § 151 et seq. The individual defendants Downes,

Goldberg, Betkoski, Kelly and George are the commissioners of the DPUC and are sued in their official capacities only for declaratory injunctive relief.

Gemini Networks CT, Inc. (Gemini) initiated the petition to the DPUC which resulted in the decision which is the subject of this appeal. For purposes of the state and federal telecommunications law Gemini is known as a competitive local exchange carrier (CLEC).

The Office of Consumer Counsel (OCC) is authorized pursuant to Connecticut General Statutes § 16-2a ". . . , to act as the advocate for consumer interest in all matters which may effect Connecticut consumers with respect to public service companies, . . . and certified telecommunications providers. The Office of Consumer Counsel is authorized to appear and participate in any regulatory or judicial proceedings, federal or state, in which such interests of Connecticut consumers may be involved, . . ."

The petition by Gemini which initiated the DPUC proceedings was filed on January 2, 2003 and requested DPUC to issue a declaratory ruling finding that certain hybrid fiber coaxial (HFC) facilities owned by SNET, formerly leased to SNET Personal Vision, Inc. (SPV), constitute unbundled network elements (UNEs) and as such must be tariffed and offered on an element by element basis for lease to Gemini at total service long run incremental costs (TSLRIC) pricing. Gemini also requested that in addition to determining that the facilities or UNEs are subject to unbundling, the department initiate a cost of service proceeding to determine the appropriate pricing structure for the

elements based on TSLRIC; and direct SNET to file an inventory of all plant formerly leased to SPV including the current condition of all such plant and the disposition of any plant no longer in place.

In response to the petition SNET requested that the proceeding be bifurcated, with a first phase of the proceeding addressing the legal issues. The DPUC concluded that the SNET bifurcation proposal was of merit and adopted such a procedure.

While the proceedings before the DPUC on this petition were pending, the federal communications commission (FCC) issued its order in Triennial Review Proceeding (TRO) August 21, 2003.[1] The DPUC reopened the record of the proceeding and requested written comments and reply comments discussing the TRO as it may have addressed the petition. The DPUC subsequently issued its draft decision on the Gemini petition on November 3, 2003, pursuant to the Uniform Administrative Procedures Act (UAPA) the parties were offered the opportunity to file written exceptions and present oral arguments concerning the draft decision. The final decision on the Gemini petition, Docket No. 03-01-02 was issued December 17, 2003.

The office of the Attorney General for the state of Connecticut and Cable Vision

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See Communications Commission Docket No. 01-339, in the matter of review of the section 251 unbundling obligations of incumbent local exchange carriers; CC Docket No. 96-98; implementation of the local competition provisions of the telecommunications act of 1996; CC Docket No. 98-147, deployment of wire line services offering advanced telecommunications capability which composed the TRO.

Light Path-CT, Inc. intervened in proceedings before the DPUC, but have not appeared in this administrative appeal of the DPUC decision.

The policy of both the federal and state governments with respect to telecommunications is to foster a competitive market in telecommunications. See the Telecommunications Act of 1996, PUB. L. 104-104, 110 Stat. 56, codified as 47 U.S.C. § 151 et seq. and Connecticut Public Acts 94-83 and 99-122 codified as C.G.S. § 16-247a et seq.

The policy finds expression in § 16-247a entitled Goals of the State provides in pertinent part: "Affordable, high quality telecommunication services that meet the needs of individuals and businesses in the state are necessary and vital to the welfare and development of our society; the efficient provision of modern telecommunication services by multiple providers will promote economic development in the state; expanded employment opportunities for residents of the state in the provision of telecommunication services benefit the society and economy of the state; . . . , therefore, the goal of the state to . . . (2) promote the development of effective competition as a means of providing customers with the widest possible choice of services, (3) utilize forms of regulation commensurate with the level of competition in the relevant telecommunications service market; (4) facilitate the efficient development and deployment of an advanced telecommunications infrastructure, including open networks with maximum interoperability and interconnectivity; (5) encourage shared use of existing facilities and

cooperative developments of new facilities where legally possible and technically and economically feasible, ..."

The clear mandates of public policy favoring the unbundling of telephone company networks is subject to the provision of C.G.S. § 16-247b which specifically deals with unbundling of such networks. Pursuant to this section the DPUC on petition or its own motion may initiate proceedings to unbundle a telephone company's network ". . . which the department determines, after notice and hearing, are in the public interest, are consistent with federal law and are technically feasible of being tariffed and offered separately or in combinations."

The court interprets the statute as requiring the DPUC to determine whether the facilities subject to unbundling are: (1) part of a telephone company network (UNE) used to provide telecommunication services (2) that unbundling is in the public interest (3) unbundling is consistent with federal law and (4) unbundling is technically feasible of being tariffed and offered separately or in combinations.

The court finds that the DPUC correctly determined that the HFC facilities constitute UNEs (unbundled network elements) which are used to provide telecommunication services and that their unbundling is in the public interest and consistent with federal law. The court finds however that the DPUC has failed to find or determine that the unbundling of the HFC network components are "technically feasible". Thus, for that reason the SNET appeal is sustained and the matter is remanded to the

DPUC to make what is a statutorily required finding or determination.

The DPUC decision, subject to this appeal is 50 pages in length and contains 41 findings of fact and conclusions of law. The decision and record contained extensive discussion of the HFC technology, but there is no specific discussion of the technical feasibility of unbundling for tariff of its various components. The court did not find any mention of technical feasibility of unbundling in the DPUC decision[2] nor was one pointed out by counsel at oral argument or in the briefs. The 41 findings of fact and conclusions of law do not in any way address the technical feasibility of unbundling the HFC system.

Gemini, DPUC and OCC argue that the technical feasibility of unbundling is apparent from the technical descriptions of the HFC system. It seems to be the case that the fiber component of the hybrid fiber coaxial system has in fact been unbundled. However, the court does not view its role as making the determination or finding which the legislature has directed the DPUC to make. It would be appropriate for the court in an administrative appeal to search the record for substantial evidence to support an agency finding, but it is quite another matter to make a required determination that the agency has failed to perform. Our Appellate Court has consistently in the context of UAPA

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The DPUC decision at pages 28-29 quotes from the Federal Communication Act § 47 U.S.C. § 251 (c) (2) and § 251 (c) (3) including references to "technically feasible point of interconnection"; but this is not a reference to the technical feasibility of unbundling required by C.G.S. § 16-247b. The DPUC decision at page 13 acknowledges that SNET raised the issue of technical feasibility, but nowhere is it discussed or decided.

cases, declined to imply a finding of fact. In Crescimanni v. Department of Liquor Control, 41 Conn. App. 83 (1996) the agency denied a liquor permit under a statute (C.G.S. § 30-46 (a) (3)) which authorized a denial on the basis of the number of permits in the locality. The agency's decision failed to make a specific finding as to the number of existing permits. The agency asked the court to imply a finding in their decision. The court responded " . . . we will not ordinarily imply a finding of fact because the opportunity to read the collective mind of the department is fraught with danger. We have consistently declined the invitation to engage in such speculation." 41 Conn. App. at 88-89. It would seem especially inappropriate for the court to manufacture a finding of technical feasibility of unbundling; when it is a matter requiring agency expertise, and the decision lacks any discussion of the subject.

It would appear that if the DPUC had found technical feasibility of unbundling the HFC system, that the history of unbundling the fiber component and the leasing of a portion of the HFC system to SPV in the past might establish substantial evidence to uphold such a finding. However, the fact that an HFC system has never been used for telephony (Gemini's proposed use) and that no OSS (Operational Support Systems) exist for HFC telephony, suggest that technical feasibility of unbundling must be examined.

Despite the clear federal and state policy in favor of telecommunications competition through shared network facilities the court feels compelled to overturn the DPUC decision. In a recent case our Supreme Court in Southern New England

Telephone Co. v. Dept. of Public Utility Control, 261 Conn. 1 (2002), though upholding a DPUC decision, noted as follows: "We feel compelled, however, after our review of the department's decision in this case and in prior decisions offered by the department in support of this appeal, to caution the department that, in our view, it has failed to apply the necessary precision in its decisions. For example, the department determined in the present case that the plaintiffs enhanced services are not 'critical' or 'essential' services. The relevant determination, pursuant to §16-247b (b), however, is whether the services are 'necessary.' Moreover, the department's finding of fact did not include a finding that the plaintiff had, in fact, unreasonably discriminated or a finding that the public interest or competition had been impaired by the plaintiff's actions, thus warranting the department's intervention. Accordingly, we caution the department in future proceedings, it should set forth expressly the statutory provision upon which it relies to exercise jurisdiction and it should articulate specific findings of fact and conclusions of law consistent with the statutory requirements in support of its exercise of authority." 261 Conn. at 32-33.

In this instance, the DPUC is again exercising jurisdiction in accordance with § 16-247b. The statutory requirements supporting such exercise of authority include a determination that the UNEs being unbundled "are technically feasible of being tariffed and offered separately or in combinations". Despite the unanimous Supreme Court admonition over the assertion of authority under the same telecommunications statute, the

DPUC does not mention "technical feasibility" of unbundling in its 50 page decision or in its 41 findings of fact and conclusions of law. This case concerns more than semantic distinctions, as the decision fails to contain any subordinate facts or discussion which confront the technical feasibility issue under any euphemism.

The public policy favoring telecommunications competition and sharing of telecommunications networks does not obviate the role of the courts in insuring that such unbundling efforts are done in accordance with law. The federal courts on at least three occasions have found the FCC unbundling efforts unlawful in part. See AT & T Corp. v. Iowa Utilities Board, 525 U.S. 366, 389-90 (1999), United States Telecom Association v. FCC , (USTA I) 290 F.3d 415 (D.C. Cir. 2002), United States Telecom Association v. FCC, (USTA II) 00-10112, Slip OP. (D.C. Cir. March 2, 2004). The court, guided by such authority as well as SNET v. DPUC, supra is unable to ignore specific statutory mandates in an effort to facilitate broader telecommunications policy.

The respondents to the SNET appeal, in addition to arguing that technical feasibility of unbundling is apparent from the technical discussion of the HFC network, also argue that pursuant to § 251 of the 1996 Telecommunications Act that the technical feasibility is presumed and that SNET would have had the burden of demonstrating the technical and feasibility of unbundling. Pursuant to the 1996 Telecom Act, the technical feasibility is presumed; however, that does not remove the statutory obligation of the DPUC to make the presumption in a finding of technical feasibility of unbundling in the

specific case.

In further argument, the DPUC though conceding the statutory requirements of § 16-247b (a), at oral argument suggested that the enactment of the telecommunications act effectively amended the statute which was essentially passed in 1994 as Public Act 94-83. However that is inconsistent with the history of the amendment by Public Act 99-222 of the specific section of § 16-247b which did not amend the technical feasibility criteria. The § 16-247b (a) requirement that the unbundling be consistent with federal law, ~~essentially~~ the telecommunications act of 1996 also does not negate the continued requirement that the DPUC find that the unbundling of a telecommunications network element is technically feasible.

The appeal is affirmed. The DPUC is ordered to vacate its decision in Docket No. 03-01-02 the petition of Gemini and reopen such case to address the determinations and findings mandated by Connecticut General Statutes § 16-247b (a).

In view of the court's decision on the merits, the SNET motion for stay is granted.

Robert F. McWeeny